

4-1-1989

Canadian Criminal Jury Instructions

James P. Taylor
University of British Columbia

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>



Part of the [Criminal Law Commons](#), and the [Legal Education Commons](#)

Recommended Citation

James P. Taylor, "Canadian Criminal Jury Instructions" (1989) 12:1 Dal LJ 184.

This Book Review is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

Book Reviews

Lord of Point Grey: Larry MacKenzie of U.B.C., by P. B. Waite. U.B.C. Press, 1988. 276 pp. Illustrated. \$21.95.

It takes two to tango and two to write a biography. Every account of a life is an act of collusion of subject and author, whether they conspire face-to-face or are separated by centuries. The author is constrained by the material with which the subject consciously or inadvertently supplies him and the subject is wholly dependent on the perception and integrity of the biographer as to whether he will appear a hero or a villain. Either way their product is an artifice, the person the subject was willing to reveal skillfully enhanced or badly botched by the biographer.

P. B. Waite has been hugely fortunate in his subject, Norman Archibald MacRae MacKenzie, known to his intimates as "Larry". Here is a quintessential Canadian. Born in a modest Manse in Pugwash, Nova Scotia, and schooled at Pictou Academy, he then laboured for four years on a farm in Saskatchewan, survived four years in the trenches of World War I (mostly with the Nova Scotia Highlanders, emerging without a scratch, but with a Military Medal and bar, and a promised but never confirmed commission), entered Law at Dalhousie, won a Carnegie Fellowship to Harvard and then a renewal to take him to St. John's College, Cambridge.

He moved to Geneva to become the assistant English-language legal adviser at the League of Nations secretariat, and after four years of cosmopolitan high-life in the loveliest setting in Europe, returned to Canada, polished and lively of wit, as professor of international law at Toronto. Ten years later, after a notable professorial career, he was invited to assume the presidency of the University of New Brunswick; after four years he moved to the University of British Columbia and there found his place in history. The rest of the story, from 1944 to 1962, is of his trials and triumphs, mostly the latter, as the driving force of that callow institution, U.B.C. Within a few years he had made it, largely by the force of his own character, into Canada's third senior league, full-fledged university.

Nor was that all. This larger-than-life Canadian was physically attractive, with the quiet strength of a farmer, the practicality of a soldier, the gregariousness of an extravert, a keen native intelligence whetted and honed by Dalhousie, Harvard and Cambridge, the *savoir-faire* of cosmopolitan European society, and a ready pen which during his Toronto years produced a flow of publications. Moreover, in Geneva he

met a very special person called Polly by her friends, fell deeply in love with her and remained so all his life; but married a lady, truly estimable in her own right, named Margaret, who was the mother of his children, and in all his offices a fitting consort. In his elder statesman years he still met and corresponded openly and frankly with Polly as only truly-matched souls may do. Poverty, struggle, war, ivy-league, social graces, triumphs, distinctions and romance: what more can any biographer ask for? A novelist who crammed so much into one short human existence would be said to have stretched credulity.

But if Waite was fortunate with his subject, MacKenzie was equally if not more fortunate with his biographer. For all the glamour and the rich detail, Waite has taken his man seriously as a human being. What he has written is no boys' magazine hero-extravaganza. Larry liked late-night parties, when the drink was flowing, and some of the tales told in the small hours have filtered through to the pages: Larry the sergeant telling a cowering figure in a funk hole (in an edited version): "Get into the fight because the Germans are a lesser risk than I am" — and meaning it; Larry the Y.M.C.A. desk clerk picking up a drunken lout by his neck and his pants and heaving him bodily into the street; Larry of whom a U.B.C. student was overheard saying to a visitor: "Professor X — oh, his office is up there. But don't believe a word he says about the President — it's not true". Such legends have their proper place; they are a part of the whole, but they are not allowed to multiply too freely.

What is more important is the way in which Waite attempts to perceive the serious intent of this life. Clearly, it did not remain unvarying. When Larry was young he was intent on living and experiencing — who would not be after four years of farm labour and four years of war? In his middle years, as an international lawyer, he was properly seized of an intellectual and a moral challenge. Was there, could there be, a viable body of shared and acknowledged perceptions which could guide the conduct of nations and be dignified with the designation "international law"? For ten years at Toronto, following law school and his apprenticeship in Geneva, it was his *métier* to find out. But then came the more glamorous, more satisfying job at New Brunswick and MacKenzie appears to have sloughed the coils of international law with remarkable ease. Waite does not hide his conviction that his subject was never truly an intellectual — he performed with immense competency and enthusiasm the job before him, whether it was fighting a war, grappling with international law or finding the necessities of life for the ever-increasing numbers of U.B.C. students. They were all phases of living his life with the greatest zest.

One revealing passage concerns Larry MacKenzie and the Student Christian Movement. Waite is to be highly commended that he takes time to tell us what the S.C.M. in its heyday was, and how great its influence was in post-World War I student circles (pp. 31-34) and of Larry's successful role in it. But when he left Dalhousie he dropped the whole thing. In a second reference to the subject Waite writes: "Some of his Dalhousie friends felt that Larry's success with the Student Christian Movement developed from his recognizing a good thing when he saw it. This may well have been a canard, but the way Larry moved into the organization and made himself master of it certainly lent itself to that kind of interpretation. For he could start on the fringe of a movement and by employing his talent for attracting young men and women, together with his native energy for getting things done, he would soon be near or at the centre of things. He was sincere about the S.C.M., as he was later about international law and the League of Nations, but he took these up with a speed and penetrated them with an ease that laid him open to the charge of being a manipulator of men, issues and committees" (p. 168). Some sour academics would add "in other words, he was a born university president".

But there is another judgement to which Waite's account of MacKenzie also gives us direction. MacKenzie, as a president, did truly great things for his university. Perhaps no other person in those helter-skelter postwar years could have done so much so speedily. Faced with the flood of veterans seeking university entrance after demobilization (the number of students in Canadian universities doubled in 1945-46) MacKenzie, apparently at the suggestion of Gordon Shrum, his resourceful chairman of Physics, decided to house his university in disused army huts. Fifteen complete army camps along the coast and in the interior were taken over, and 12 of them moved by truck or barge to join the three already on Point Grey. In the final count, U.B.C. took over the equivalent of 370 standard huts, and MacKenzie had secured housing for his university. (Two of the huts were tastefully adapted to serve as the President's residence.) Legends gathered around the exploits of Shrum and his accomplices in spotting and expropriating the coveted buildings. "When the U.B.C. fall term began in September, 1945, Larry announced that formal authority to move the huts had come from Ottawa. A gale of laughter ran through the students. They were already attending classes in the transplanted buildings" (p. 124).

What Waite, with modest understatement, describes as "a curious story" concerns the Faculty of Law. In the spring of 1945 MacKenzie announced that the following September law students would be enrolled. "At that point, the university had no buildings [for Law], no library, no

money (except for \$10,000 promised by Victoria), and no faculty apart from Larry. If the worst came to the worst, he would have to teach everything!" (p. 125).

George Curtis had been at Dalhousie Law School since 1934, and had risen to the rank of Bennett Professor. In June, 1945 he was on his way to Edmonton to consider becoming Dean of Law at the University of Alberta. On the train he received a telegram: "Don't get off train. Come to see us first. MacKenzie." Curtis continued on to Vancouver and was Dean of U.B.C. Law school within weeks. In October he was in the office of the Dean of Arts when Dean Buchanan said, "Forgive me interrupting, but you may be interested. There is the Law School going by, along the Mall." Curtis looked out of the window and, sure enough, it was. Two army huts were being laboriously hauled on tractor-trailers. They were to be the first home of the men of Law on the U.B.C. campus. Waite tells the story with the panache it deserves, but does not linger to consider the feelings of Dalhousie at losing their Bennett Professor so late in the school year, or of the University of Alberta at having their prospective dean snatched away from them. MacKenzie knew when to play the robber baron, and in his first decade at U.B.C. he built a mighty fiefdom on the West Coast.

The opportunity for MacKenzie's finest contribution to the cause of Canadian education at large presented itself at the end of the decade in the work of the Massey Commission. By that time he had been well prepared for the assignment. He knew at first hand the plight of Canada's universities from his experiences at the University of New Brunswick and in British Columbia, and as chairman of the Postwar Needs Committee of the National Conference of Canadian Universities he knew a great deal about higher education institutions across the country generally. They were (with one major exception, McGill, a privately-endowed foundation) provincial institutions, and the provinces did not have access to the kind of funding that was needed. "The nub of [the matter] was, as Larry put it in a 1950 article in the *Canadian Journal of Economics and Political Science*, that Canadian universities simply could not educate students without substantial increases in funding. Because of the Canadian tax system, with that powerful lever controlled in Ottawa, the logical, and in some ways the only, source of additional funds had to be the federal government" (p. 145).

MacKenzie found a powerful ally in Principal F. Cyril James of McGill (he could hope for federal aid where he could not expect provincial) though two men more unlike would have been hard to find. James was an Englishman who had never become Americanized despite his student days in Philadelphia and his decade and a half teaching in the

United States. After a similar period in Canada he was thoroughly Canadianized, but in the old imperial style which still thought of Canada as a British dominion and of England as "home". In personal relationships he was reserved, inhibited and self-conscious. He could never have wandered into the union, grabbed a cup of coffee and sat down among his students as one of them as Larry MacKenzie loved to do. But in public performance or in official negotiations he was unequalled. On the need for federal funding of Canadian universities the two men were of one mind.

While MacKenzie was chairing the N.C.C.U. Postwar Needs Committee James was chairing its Finance Committee, charged with finding the means to meet the necessities that had been identified. It was decided that an appeal should be made directly to the federal government and James secured an interview with the Prime Minister. Louis St. Laurent heard the presentation sympathetically, but said that first the Canadian public must be made aware of the need for federal intervention, and secondly, nothing could be done until the government had received the report of the Royal Commission on Arts, Letters and Sciences which he had appointed under the chairmanship of Vincent Massey, the former High Commissioner in London (and future Governor General of Canada). This response was encouraging, for MacKenzie had himself been named a member of the Commission — as were also Hilda Neatby, Professor of History at the University of Saskatchewan, and Georges-Henri Lévesque, Dean of Social Sciences at Laval. The cards appeared to be stacked in favour of the universities. James prepared and presented a brief before the Commission and at the same time organized a publicity campaign to inform the Canadian public of the dire need for federal assistance. With James one side of the table arguing the case and MacKenzie on the other largely influencing the result all appeared to be going well.

Waite gives a detailed and, at times, very entertaining account of the private life of the Commission, as revealed by MacKenzie's personal papers, and adds an excellent thumbnail sketch of its chairman. Massey was properly sensitive to the difficulties the situation presented. Georges-Henri Lévesque gallantly came over to the supportive side: "*Et j'ai consenti! et bien librement! même si j'entendais déjà éclater le tonnerre dans le ciel Québécois!*". But Massey still hesitated. "As for aid to the universities, he said, it would be difficult to recommend, although the other [members of the Commission] had agreed that they could recommend money for scholarships . . . But Massey was still shifting towards Larry's position, and he was much impressed with the arguments of Cyril James a few weeks before. As far as Larry was concerned *any*

proposals to help the universities would meet with his approval; he added a prescient suggestion from Jack Pickersgill [was] on the way to make a stronger recommendation for university support more palatable" (153). The "prescient suggestion" proved more plausible than logical, but it was sufficient to tip the balance and the recommendation was made. It was accepted by the government and on 19 June, 1951, St. Laurent announced that effective for the academic year 1951-52, the Canadian government would support Canadian universities.

Waite gives an excellent account of this great achievement, and of MacKenzie's major role in it, although he stops short of pointing out that by this devious route Canada had found its way to a national policy on higher education. Nor does he comment (it was not part of his story) that the new era of university financing had dawned for everyone except for the man who had worked so effectively with MacKenzie to secure the benefits. Cyril James ran into the blank wall of Quebec provincialism and his university (like all others in the province) was forbidden by Maurice Duplessis to accept the \$600,000 the federal government was prepared to give to McGill.

But universities in the rest of Canada were under no such prohibition, and they had good reason to be grateful to their colleague from British Columbia who had played a major role in securing the new dispensation. In the early and middle '50s MacKenzie of U.B.C., Sidney Smith of Toronto and Cyril James of McGill were the great trio of university presidents who were notable figures on the national scene. Smith went on to become Secretary of State for External Affairs in John Diefenbaker's second government. In the next decade provincialism everywhere prevailed, and the other provinces followed where Quebec had led. Federal funding was diverted to flow through the provincial capitals and university presidents had perforce to become immersed in local politics. The days when Canada could hammer out a national policy of higher education were over.

MacKenzie knew that in the work of the Massey Commission he had participated in achieving a triumph, not merely with regard to university education but with regard to the cultivation of the arts generally. Waite tells us that he even sent the two volumes, the Report and the bound copy of studies that accompanied it, to Polly at her home in England. "She was enthusiastic . . . How wonderful, she said, to be a Canadian! 'How right you were,' she told Larry, 'those long years ago to return'" (p. 167). Reviewing what he had accomplished in his several roles, we are very ready to concur.

The story, therefore, takes on a sense of greatness in decay, a dimension of the tragic, when Waite has to be true to his material and

record that in MacKenzie's later years at U.B.C. from 1955-62, the traits which had appeared only briefly earlier came more and more to dominate. "Larry himself had come a long way. He had developed his share of the seven deadly sins, but the worst was pride. The older he grew, and the more achievements he put behind him, the more his consciousness of them grew" (p. 167). His concern for the university was overtaken by his concern for his position in it. After he had fought and argued and connived to get his university what it needed, he appeared to have lost perception why he had done it. Consequently, gaps began to appear in the identification of U.B.C. and its president. First, persons, then departments and whole disciplines began to pull away from the president's personal magnetism; criticisms began to make themselves audible in the inner circles; impatience with his lack of understanding bred ridicule in the lower ranks. The story of the decline and fall of MacKenzie is very sad. Once the university had gotten away from him he had, it appears, no intellectual convictions on which to fall back, no academic faith or joy in seeing others take up and carry on to further success what he had so nobly begun. He saw, it would seem, only that the university had pushed him out.

This is a book which one is loathe to criticize because as a whole it has been so well done. But one judges that Waite might have shortened for us his account of the long, lingering decay of this great man, after his unhappy resignation — or rather, dismissal. The author has also indulged surely in "a meticulousness of notification" — at times we feel that Larry MacKenzie cannot sneeze but we must be given chapter and verse for it. But many would class that as a good fault. After one has closed the book, one wonders at the title and dust jacket: "Lord of Point Grey", a regal figure in all his academic splendour. The real MacKenzie, we have been told, liked to put on the airs of a rustic fellow, and chose often to speak like one, and loved to be hail-fellow-well-met with campus staff and students alike. Wouldn't "Boss of Grey Point" in an old woollen pullover have been more fitting?

But then we remember that MacKenzie was also "inordinately proud" of being made a director of the Bank of Nova Scotia, and also of his 21 honorary degrees, and of his three bronze busts, one at U.B.C., one at New Brunswick and one at his *alma mater*, Dalhousie. So there was also a lordly side to Norman Archibald MacRae MacKenzie as well as the gregarious rustic, either character waiting to be assumed as occasion required. He was only rustic when the wind lay in the north-northwest.

P. B. Waite has handled his complex subject with perceptive understanding, and the mass of papers involved with great dexterity. Author and subject may indeed congratulate themselves; they have served each other well, and between them have produced a first-rate biography.

Stanley B. Frost
McGill University
Montreal

Canadian Criminal Jury Instructions, by G.A. Ferguson & J.C. Bouck. Vancouver: The Continuing Legal Education Society of British Columbia, 1987. pp 1600. \$195.00

Canadian Criminal Jury Instructions ("CRIMJI") is an ambitious project. The authors, the Honourable Mr. Justice John Bouck (of the Supreme Court of British Columbia) and Professor Gerry Ferguson (of the Faculty of Law, University of Victoria) set out to provide a book that will "assist Canadian judges and Canadian lawyers in drafting and delivering a charge to a jury in a criminal case".¹ The authors' two-volume work handily accomplishes this objective.

It should be unnecessary to seek justification for such a work beyond the obvious. The work can't help but positively contribute to the work of judges faced with the delivery of a charge to a jury in a criminal case and, as well, to the work of lawyers in drafting their addresses in the same circumstances. The authors, however, do provide justification. The authors conducted two surveys which they report on. The first survey involved considering all of the appeals of jury charges to the Supreme Court of Canada between 1974 and 1984. Of 33 cases examined, in 55 per cent of the cases the charge was upheld without adverse comment. In 12 per cent of the cases the charge was found to be wrong, but the Supreme Court of Canada concluded there had been no substantial miscarriage of justice and applied the curative provisions of the *Criminal Code*. In 33 per cent of the cases the charge was found to be sufficiently in error to require a new trial.² The second survey involved examining cases reported in one of the series of criminal reports between the years 1981-1985 involving appeals of jury charges to the Ontario Court of Appeal. Of 47 appealed jury charges, the Ontario Court of Appeal upheld 23 (14 by virtue of the curative provision) but ordered a new trial in 24 cases.³ While these statistics may not be statistically conclusive (something the authors acknowledge), they are helpful in restating what appears to be an obvious point — charging a jury can be a difficult business both because of the intellectual complexity of the notions that have to be communicated and the very difficult working conditions in which some of the charges are drafted; any tool that assists in the process cannot help but make a beneficial contribution to the quality of criminal justice.

CRIMJI consists of 10 separate chapters dealing with various aspects of the charge that a trial judge must necessarily consider in a criminal

1. Ferguson, G.A. and Bouck, J.C., *Canadian Criminal Jury Instructions* (Vancouver: The Continuing Legal Education Society of British Columbia, 1987), at 1.

2. *Id.*, at 2.

3. *Id.*, at 2.

case: Opening Comments To The Jury Panel (Chapter 1), Instructions Given During The Course Of The Trial (Chapter 2), Directed Verdicts (Chapter 3), Introductory Instructions And Instructions On The Evidence Following The Submissions Of Counsel (Chapter 4), Parties To Offences (Chapter 5), Offences (Chapter 6), Included Offences (Chapter 7), Defences (Chapter 8), Closing Remarks (Chapter 9) and Post-charge Instructions (Chapter 10). In addition there are a series of appendices and the usual supporting material such as a table of cases, a table of statutes, a list of references and an index.

Each chapter consists of a series of discrete, general topics. Each general topic is introduced by a table of contents that broadly describes the contents covered in the topic. The treatment of the topic usually consists of several paragraphs, often separated by subheadings for particular paragraphs or groups of paragraphs. The subheadings are identified in the table of contents. The language used throughout is as plain and simple as the circumstances permit. Where the authors feel authority is called for to support a suggested portion of the charge, the authority is set out in the footnotes, which are found at the end of each separate topic. This general format should prove helpful.

The authors acknowledge that for a variety of reasons CRIMJI will not be, and should not be, slavishly and universally applied. Obviously a judge may have her⁴ own way of expressing commonplace ideas which she may well prefer.⁵ Some instructions will not be found in CRIMJI as CRIMJI does not attempt to cover every possible offence that may be tried by a criminal jury.⁶ Some of the editorial decisions the authors have made may not find favour with a particular judge. As an example, the authors adopted the rule that they would not make any substantial departure from the language of a statute and little or no change in the words used by higher courts in their suggested charges. They suggest that if it is difficult to make sense out of a statute because of antiquated or abstruse wording, or if it is hard to understand the language used by the higher courts, then the safest course to follow is to leave the words alone and repeat them as found, providing examples of supplementary explanations where possible.⁷ Some judge may feel less comfortable with this approach than others. However, given all this, the format allows the reader to easily access the relevant topic, consider the authors' suggestions, and consider the authority that the learned authors rely on.

4. I use the feminine pronoun throughout. It includes the masculine.

5. Which the authors acknowledge, *supra*, note 1, at 11.

6. *Id.*

7. *Id.*, at 12.

Where a judge decides to go from that point is up to her, but at least she starts with a reasoned, considered, and substantial first draft.

The looseleaf format of the work means that, where this is thought helpful, the reader (judge or lawyer) can remove the appropriate section of the work, photocopy it (which the authors suggest be done, thus presumably countenancing the violation of copyright involved) and make any additions or revisions that the reader wishes to make directly on the photocopied "draft".

There are some questions about form that could be raised. The authors use a "he/she" formulation frequently in the text, suggesting that the reader strike out the alternative that is incorrect in the particular case. I think it preferable to choose one or the other of the pronouns, footnote the first use (as I have done in this review), and thereafter use only one throughout (a formulation the authors partially adopt in the text). Often a blank is left, followed by "(The Accused)" or some other formulaic instruction. In many of these cases it might have been preferable to simply delete the blank and use the formulaic instruction as part of the text. It would be helpful to have a table of contents chapter by chapter (as well as topic by topic within a chapter). In using a reference book such as CRIMJI it is often inconvenient to go back to the initial table of contents in order to find your way around within a chapter. However, all of these comments as to style and form are quibbles. In general the book is, in terms of style and format, very readable and usable. The proofreading has been exceptional (I detected *no* proofreading errors), the type is easy to read and the layout is admirable.

The substantive content of CRIMJI is very broad. CRIMJI does not attempt to give an elaborate, comprehensive, doctrinal treatment of the areas being considered. Rather it sets out the distilled result as understood by the authors, giving authority where necessary, and issuing warnings that the authors think appropriate. In my opinion it does this exceptionally well. I illustrate this by the treatment of proof beyond a reasonable doubt.

The suggested instruction on reasonable doubt is:

You may ask "what does proof beyond a reasonable doubt mean?"

There is no simple answer to this question. A reasonable doubt may arise from the evidence, a conflict in the evidence, or a lack of evidence. A reasonable doubt is a doubt based on reason. It is not an imaginary doubt. It is the sort of doubt for which you could give a logical and rational explanation, if asked.⁸

8. *Id.*, at 4A-15

There are two footnotes. The first warns “that a judge who attempts to further define reasonable doubt does so at his or her own peril”⁹, giving authority and some discussion. The second footnote warns that a similar formulation (presumably that in the last two lines) was disapproved of in an English authority but that there is support in Canada for the formulation.¹⁰

Unfortunately CRIMJI uses a bad example of circumstantial evidence. In the section on direct and circumstantial evidence the authors describe direct and circumstantial evidence thus:

Types of Evidence — Direct and Circumstantial.

1. Before commenting on the evidence in this case, I must give you a particular warning about circumstantial evidence. There are two types of evidence in any criminal case. One is direct evidence. The other is circumstantial evidence. Both direct evidence and circumstantial evidence are admissible as a means of proof. Sometimes circumstantial evidence is more persuasive than direct evidence. The evidence of one witness may contradict that of another, but the circumstances of an event are often not in dispute. I will explain the difference between these two types of evidence by way of example.

Example — Direct Evidence

2. Suppose John Doe is on trial for murder. A witness testifies that he saw John Doe shoot the victim. The witness says that John Doe raised a gun and pulled the trigger. The witness then heard a bang and saw the victim fall to the ground. This is direct evidence that John Doe shot the victim. Direct evidence has two possible sources of error. First, the witness might be lying for one reason or another. Second, the witness might be mistaken. For example, the witness might make a mistake in identification of the person who shot the victim. If the witness is not lying or mistaken, the proper conclusion is that John Doe shot the victim.

Example — Circumstantial Evidence

3. On the other hand, suppose nobody actually saw John Doe shoot the victim. However, a witness testifies that she heard a noise like a gunshot, and went into the room where the noise came from. In that room she found John Doe standing over the victim, and John Doe had a smoking gun in his hand. This is circumstantial evidence that John Doe shot the victim. Again, it is possible that the

9. *Id.*, at 4A-17

10. *Id.*,

witness is lying or mistaken. However, in the case of circumstantial evidence, there is a third possible source of error — it is possible to draw the wrong conclusion from the circumstances. Let me expand on this a bit. Suppose the witness in our second example is being truthful and accurate. John Doe was standing over the victim and he was holding a smoking gun in his hand. It is still possible that John Doe did not shoot the victim. For example, John Doe might have been outside the room when the victim was shot and come into the room before the witness did, unconsciously picked up the smoking gun, and bent over the victim to see if he was still alive. If this were the case, it would be wrong to conclude that John Doe had shot the victim, even though the witness is not lying or mistaken.¹¹

The difficulty is with the example of direct evidence. The example involves the witness drawing an inference from the circumstances, that the pointing of the gun, the sound of the discharge of the gun, and the victim falling to the ground are somehow related. With respect, that scenario is not direct evidence that the accused shot the victim. Direct evidence would require that the witness see the slug leave the gun and enter the victim. The example is circumstantial evidence. It may turn out, given other evidence called, to be compelling circumstantial evidence, or, even on its own, it may be found to be compelling circumstantial evidence, but it is not direct evidence, and, with respect, it should not be described as such. Having made this criticism I should note that the authors need not feel too badly about the example. First, it is commonly used as an example of the difference between direct and circumstantial evidence. Second, it received prior published circulation in Canada apparently without adverse comment.¹² Third, even this inaccurate example is incredibly more helpful than the brief suggested instructions in some standard American equivalent works.¹³

CRIMJI was an immense undertaking. Its production is a tribute to the authors' energy, perseverance and dedication. Its quality is a tribute to their experience, ability and creativity. CRIMJI will be immensely helpful to judges conducting criminal trials throughout Canada. It will likewise, particularly as it begins to be adopted and used by trial judges, be an authority that no criminal lawyer can ignore in her preparation for

11. *Id.*, at 4B-12 to 4B-14.

12. Kennedy, J. De. N., *Aids to Jury Charges (Criminal)*, (Agincourt: Canada Law Book, 1975) at 37-38.

13. See, for example, *Manual of Model Jury Instructions for the Ninth Circuit* (St. Paul: West Publishing Co., 1984) at 9, and Devitt, Edward J. and Blackman, Charles B., *Federal Jury Practice and Institutions* (St. Paul: West Publishing Co., 1970) at 208.

an address to a jury. For a trial judge not to make reference to it in assisting her in the difficult task of charging a jury would be difficult to justify. For counsel, knowing that the trial judge may charge the jury in the language of CRIMJI in due course, not to cunningly reflect that language in counsel's address would be unforgivable.

James P. Taylor
Faculty of Law, University of British Columbia
Member, Bar of British Columbia

The Tokyo War Crimes Trial. Edited by C. Hosoya and Others. N.Y.: Harper & Row, for Kodansha International, Tokyo, 1986. Pp. 226.

Until comparatively recently (*see, eg., The Other Nuremberg* by Arnold C. Brackman, 1987) there has been little written in western countries concerning the International Military Tribunal for the Far East — the Tokyo Tribunal — when compared with its “sister” Tribunal at Nuremberg. The compilation of Principles drawn up by the United Nations is known as the Nuremberg Principles regardless of the fact that the same principles were applied in Tokyo. In 1983, to coincide with the first Japanese showing of the film *The Tokyo Trial*, premiered in New York two years later, an International Symposium on the Trial was held in Tokyo. Papers were presented from four perspectives — international law, history, the contribution to the quest for peace, and the trial’s contemporary significance. The present volume reproduces the texts of the papers delivered at that Symposium, and though most of the participants were Japanese an attempt was made to preserve a measure of objectivity and balance.

Unlike Nuremberg, the tribunal in Tokyo was established by General MacArthur as Supreme Commander for the Allied Powers and not by treaty. Moreover, it was made up of judges nominated by the eleven countries most intimately involved as opponents of Japan, rather than, as at Nuremberg, by the four major allies as representative of the whole United Nations alliance against Germany. The Dutch and youngest member of the Tokyo Tribunal — a mere 39 — was B.V. Röling who produced the earliest English record of the trial in 1977. He not only provided a paper for the symposium on the Trial and the Quest for Peace, but also wrote the introduction to this version of the record, and it is to his memory that the volume is dedicated.

Röling was among those who had reservations as to the fairness of the Trial, and states in his Introduction that “although I often disagreed with decisions about procedure, the unfairness never reached a point where I felt compelled to resign my position as a judge” (p. 19). He was also critical of the conduct of Sir William Webb, the president of the tribunal (Brackman, p. 382), a view which had been expressed by the current reviewer as early as 1948 (Green, “Law and Administration in Present-Day Japan”, 1 Current Legal Problems 188, at 200). Unlike Nuremberg, there was no overall unanimity among the judges. In Europe only the Soviet judge was critical of the leniency of some of the sentences, but he did not really dissent. At Tokyo, there were dissents, of which the most important was that by Pal J. of India. Röling himself supported the acquittal of five of the accused, including General Hata, although he later wrote that “since the appearance of evidence concerning biological

weapons, I no longer feel the same degree of certainty in regard to General Hata. For it is quite conceivable that he was involved in this criminal enterprise, or at least knew of it" (p. 18). On this subject he has, in another statement, been far more brutal in his comments. He stated that the United States should be "ashamed because of the fact that they withheld information from the Court with respect to the biological experiments of the Japanese in Manchuria on Chinese and American [and Soviet] prisoners of war. . . As one of the judges in the International Military Tribunal for the Far East, it is a bitter experience for me to be informed now that centrally ordered Japanese war criminality of the most disgusting kind was kept secret from the Court by the U.S. government" (Brackman, p. 200).

Many readers of Röling's Introduction may feel, as does the present reviewer, that by the time he wrote this, whatever may have been his feelings as a Dutch lawyer after the liberation of Dutch colonial territories wherein atrocities of the worst kind had been committed, he was more concerned with political ideology than he was with legal principles. This is particularly true in relation to his comments on aggression, the function of war and the peace movement (pp. 21-27), though few will argue with his remark that "the elimination of war demands tolerance and a readiness to make sacrifices on behalf of peace. The price of peace may be high and entail unpleasant consequences, such as restrictions on sovereignty in many areas. Only the deep conviction of the absolute impermissibility of war can further the willingness to make such sacrifices. Reviving the memories of World War II, including the atrocities and the judgments, has the merit of contributing to that deep awareness of that repugnance of war that mankind needs in order to survive" (pp. 26-27). The political character of Röling's approach is clear from his account of how the "crime" of aggressive war developed (pp. 115-128). One might expect from a former international judge that he would sustain some of his dogmatic statements by legal reasoning. Far from doing so, however, Röling considered it adequate to state *simpliciter*, "it is an irony of history that the *illegal* and *criminal* American atomic bombs probably contributed to the conviction that Japanese aggression had been criminal. . . . Moreover. . . the United States had insisted that international tribunals should be established by which the world would confirm that wars of aggression were illegal and criminal, thereby vindicating the *American violation of neutrality laws*" (pp. 128, 129, italics added). Interestingly, he had earlier attributed to Stalin the desire to see aggression made criminal and those responsible therefor brought to justice (p. 126). *In fine*, he was of opinion that the most significant factor of the Nuremberg and Tokyo trials was "that the

essence of the applied law is that individuals have international duties which transcend the national obligation of obedience imposed by the individual state. Now that governments seem to be entangled in irresponsible militarism — now tht it becomes even more clear that only the collective will of the people can save humanity from extinction [-how?-] — the judgments of Nuremberg and Tokyo have become *an indictment against the present behaviour of the superpowers*" (p. 133, italics added).

The two Japanese papers on Tokyo and the quest for peace are personal and subjective. Tsurumi Shusuke, described as a philosopher, points out that to a great extent Japanese reaction to the Trial was that the accused were "unlucky" and the trial was "a strange historical trick" (p. 145), especially since Korea and Vietnam had led them "to assume a stance of ironic skepticism toward the confident pronouncement of Japan's guilt handed down by the Allied powers in Tokyo" (p. 139). In contrast to these views are the blunt statements by playwright Kinoshita Junji who states that his "failure to pursue the responsibility of Japanese for the war is the greatest regret of my life" (p. 149). Even though he had no part in policy-making he questions whether he can honestly say that he was totally innocent: "What if I had had the right to speak out publicly during the war? What would I have done? What if I'd *had* to speak out: Could I really say that I would not have collaborated with the war effort? It was true that I entered society after with my hands clean. But wasn't this in fact nothing more than a result of not having a voice in matters during the war? There is absolutely no guarantee that I would not have supported the war if my age and social position had forced me to do so . . . [However,] those who would pursue responsibility for a war, who would criticize or accuse others, are unqualified to do so unless they are painfully aware that they too, as human beings, contain within themselves the potential for acts that would expose them to criticism and accusation. Perhaps, therefore, it is precisely criticism and accusation of this kind, based on a hard self-awareness, that can have meaning and, having meaning, be effective. In short, I believe that only those who are capable of feeling the pain of guilt that stings themselves can sting others." (p. 15).

When discussing the Tokyo trial in its historical perspective, the historian Kojima Noboru asserts that "the Tokyo trial was unprecedented, and I doubt that a similar trial will ever be held in the future. Yet, . . . the Tokyo trial potentially had great significance in promoting understanding and mutual reflection between East and West. . . The very act of tracing the steps of Japan's past history with care and dispassion should have created a deeper understanding of Japan, as well as of the

actual situation in the various Asian countries into which Japan advanced under its 'mainland policy' and its other policies. At the same time, it should have been an opportunity to promote mutual understanding between the countries of Asia, as well as understanding of the relationship between Asia and the West. Given the fact that war often arises from a lack of mutual understanding, I believe that promoting understanding of Japan and Asia can become an important basis for the prevention of future wars and the preservation of peace, which was the goal of the Tokyo trial" (p. 70). Given that mutual misunderstanding may well cause war or conflict, it is perhaps asking a lot of the victims of Japanese atrocities to have used the opportunity of the trial to advance understanding Japan and its motives. It is hardly surprising that "this was not the perspective adopted at the Tokyo trial. Instead, emphasis was placed on the hasty trial and punishment of the atrocities that had been committed by a defeated Japan" (*ibid.*). Mr. Kojima deplores the fact that "the view of Japanese history put forward by the prosecution and expressed in the majority opinion — that is, the 'war crimes view' of Japanese history — continues to be accepted totally and uncritically. . . . [I]n Japan at that time, the Tokyo trial was not perceived merely as a trial that brought certain wartime leaders to account, but rather a condemnation of Japanese history itself. Moreover, while the terms have a bad connotation, the trial gave birth to an atmosphere in which Japan was viewed as a 'criminal state' and the Japanese people as a 'criminal people'. . . . That this tendency to treat Japan as an 'ex-con' has deep roots in some foreign countries, too, is evident from the accounts of Japan in their schoolbooks. . . . [A]ccepting this historical view *in toto* also has the effect of closing the way to genuine research on international history. . . . [T]he Tokyo trial is not simply an object of retrospection or something that concerns Japan only. . . . [I]t should become a kind of stimulant, or starting point, for historical research, showing all of us the unvarnished reality of each other's past. That is precisely what would give renewed life to the Tokyo trial, which has become a brake on international understanding, and give the trial a role in contributing to world peace" (p. 78).

Perhaps if Japan were more willing to remove from places of authority in government and industry those whose records are far from unblemished, particularly in regard to chemical experimentation, and were not so determined to "clean" its schoolbooks of any indication of Japanese wrongdoing or aggression against its neighbours, these words might ring more true. While saying this, it should not be overlooked that in his paper Professor Awaya Kentaro bluntly stated that "perhaps the most horrible acts of the Japanese army were not prosecuted by the

Tokyo tribunal. . . . Unit 731 of the Guandong Army conducted germ warfare experiments, including vivisection, on more than three thousand prisoners of war from China and other countries. . . . At the time of the Tokyo trial, the Soviet Union vigorously demanded the investigation and punishment of [Lieutenant General] Ishii and his staff. GHQ did not respond to these demands [in fact American commentators denounced these demands and a Soviet trial as propaganda exercises; see, e.g., *The Japanese on Trial* by P.R. Piccigallo, 1974, pp. 150-156]. It is said that Ishii and others escaped prosecution by turning over to the United States the data on their experiments and their use of germ and chemical warfare in the field. . . . [B]ehind the immunity granted Unit 731, I detect the national self-interest of the United States, which was willing to grant immunity to criminals in order to secure a monopoly on the most up-to-date information concerning techniques of warfare" (pp. 85-6). He goes on to say, however, destroying much of the *mea culpa* of this comment, "I cannot help feeling that this mentality has something in common with the decision to place the dropping of atomic bombs on Japan outside the jurisdiction of the court." Regardless of the legality or otherwise of these attacks, it is submitted that by this remark, common to much Japanese reaction to the trial, he shows a failure to understand the nature and jurisdiction of the tribunal.

From the legal point of view it is perhaps the papers delivered at the opening session — "The Tokyo Trial from the Perspective of International Law" — that are of most interest to lawyers. For the main part, Professor Lounev of the Soviet Academy of Science Institute of State and Law confined himself to a factual summary of the background of both the Nuremberg and Tokyo tribunals, but he went on to assert that the two judgments "serve as an important moral and legal weapon in the struggle for peace and against the preparation and waging of aggressive wars, in which nuclear and other weapons of mass destruction are used. . . . Under present conditions, when progressive forces all over the world struggle for peace and the prevention of nuclear war, when in some countries aggressive tendencies are growing and military conflicts are being provoked, it is very important to strengthen friendship among peoples. At the same time, we should not forget that those persons who committed crimes on occupied territories during World War II, who committed crimes at prisoner-of-war camps, who committed atrocities against civilian populations — all bear criminal responsibility. Many war criminals are still hiding in the U.S.A., some countries of South America, Canada, West Germany, and other countries. . . . Unfortunately, the governments of some countries do not observe the resolution of the General Assembly and refuse to extradite war criminals on the demand

of the Soviet Government and the governments of other countries" (pp. 35-6). This comment has, to some extent, been overrun by historic developments. The speaker's political bias is seen by his criticisms of the organization of the tribunal. Despite his statement that "in constituting and conducting the Tokyo tribunal, the experience and the charter of the Nuremberg tribunal were widely used" (p. 35), he complains of "shortcomings in the organization and functioning of the International Military Tribunal for the Far East. First, the charter of the tribunal was not prepared on a collective basis by the states participating in the trial. . . . [I]t was drafted personally by the supreme commander of the Allied forces, General MacArthur[!]. Apart from that, it somehow contradicts legal tradition that the president of the tribunal was not elected by the members of the tribunal [are Chief Justices usually so chosen?] but was appointed by General MacArthur himself. The chief prosecutor was also appointed by General MacArthur, unlike Nuremberg where all prosecutors from participating countries had equal rights and participated on an equal footing. And, from our point of view, it does not seem a very democratic procedure when defence counsel from the United States were allowed to participate in the trial even though they were from a country that was at the same time prosecuting the war criminals" (pp. 36-7, italics added). One is inclined to enquire the nationality of defence counsel in the Soviet Union, or elsewhere.

Perhaps the clearest example of Professor Lounev's political approach is seen in his assertion that "the crimes committed by German and Japanese war criminals during World War II are being repeated now by the Israeli aggressors in the Middle East and the aggressors of the Republic of South Africa, who provoke military conflicts, wage aggressive wars, violate international laws and customs of war, kill people, and deport civilian populations from the territories in which they were born and lived" (pp. 34-5).

A more specifically legal approach was taken by Professor Ipsen of the Ruhr University, although here, too, we see national biases coming into play. Having pointed out that Japan had by the Instrument of Surrender undertaken to carry out the provisions of the Potsdam Declaration, including that for the prosecution of war criminals, and having referred to the rights of an occupant under Article 43 of the Hague Regulations 1907, he maintained that "[n]either the wording nor the object and purpose of the Instrument of Surrender, or of Article 43 of the Hague Regulations, could be taken as a legal basis for the argument that the powers of the supreme commander included the right to establish a jurisdiction that was unknown until that time in international law or in municipal Japanese law" (p. 38). Insofar as a claim to exercise

international, as distinct from municipal Japanese jurisdiction is concerned, he maintained that "the charter of the I.M.T. exceeded the framework of the existing international law [in that] it changed state responsibility for the breach of treaty obligations into individual responsibility; second, it took individual responsibility as the basis for a newly created international criminal law. Therefore, the jurisdiction of the tribunal with regard to crimes against peace remains doubtful" (p. 41). As to war crimes, "defendants who were prisoners of war had to be treated in accordance with the Geneva Convention of 1929. It was within the jurisdiction of the detaining powers to try them, and to punish them, for violations of the laws or customs of war in conformity with Articles 45, 60 and 63 of the Geneva Convention, as well as for offenses committed before they had been captured. Second, according to customary law already developed before World War II, defendants other than prisoners of war could be tried and punished by courts martial of the occupying powers within the limits set up in Article 43 of the Hague Regulations. These findings raise doubts about the jurisdiction of the Tokyo IMT, which clearly was a court-martial and did not apply the law of the detaining powers" (p. 42). On the other hand, he concedes that crimes against humanity might be considered as being within the concept of general principles of law recognized by civilized nations as prescribed by Article 38 of the Statute of the World Court. "For decades the legal order of every civilized nation had provided for trial and punishment in cases of offenses such as murder, extermination, and similar inhumane acts. Therefore, within these limits, crimes against humanity may be derived from a recognized source of international law. Until Nuremberg and Tokyo there was no precedent in international law for jurisdiction over such crimes to be conferred on an international tribunal; still, by virtue of the Hague Regulations it was a lawful act to establish such jurisdiction. For its Article 43 empowers the occupying powers 'to take all the measures . . . to restore . . . public order . . . while respecting, unless absolutely prevented, the laws in force in the country.' The urgent necessity of establishing the jurisdiction of an international tribunal for such grave offences as crimes against humanity was an exceptional case under this provision. Therefore, with regard to crimes against humanity, the I.M.T. has an assured basis in the international law then in force. To the extent that the jurisdiction of the I.M.T. extended to persecutions committed in the execution of or in connection with any other crime within the jurisdiction of the tribunal, that jurisdiction exceeded the limits of international law then in force. Therefore, the definition of crimes against humanity did involve a decisive expansion of existing international law" (p. 42). He considers the conspiracy charge to be a

denial of the concept of individual responsibility and, in any case, to be a concept only known in Anglo-American law, “and even there it has been contested by learned lawyers” (p.43).

Professor Ipsen concludes by pointing out that, in the *Calley* cases, in the instructions from the military judge to the court, “there was not a single reference to similar international precedents [there was of course no need for any such reference in view of the law under which Calley was tried]. . . . In the light of development and state practice since Nuremberg and Tokyo, we must conclude unhappily that the law of both charters has been neither reaffirmed by treaty nor developed into customary law” (p. 44). Thus are the Resolutions of the General Assembly and the *opinio juris* developed since 1945 cavalierly dismissed!

Finally, Professor Onuma Yasuaki deals with the trial “Between Law and Politics”, starting from the premise that “the Tokyo trial was unfair. As at the Nuremberg trial, the Tokyo tribunal judged only the Axis power involved. Japan was not even allowed to raise as issues the actions of the Allied powers, which include the atomic bombing of Hiroshima and Nagasaki by the United States [on this issue it might be of assistance to the reader to look at the reviewer’s paper on nuclear weapons and the law of armed conflict in Cohen and Gouin, *Lawyers and the Nuclear Debate*, 1988, 91, particularly the analysis of the Tokyo court’s decision in the *Shimoda* case] and the violation of the neutrality . . . by the Soviet Union. . . . This aspect of unfairness — the fact that the tribunal had the character of a political trial — is one of the major factors leading to cynicism about the Tokyo trial. For many people, the Tokyo trial proved the maxim that ‘might makes right’ ” (p. 45). Like so many of the participants in this discussion, Professor Onuma joins those who maintain that “the postwar conduct of the countries that judged the Axis powers in the trials at Nuremberg and Tokyo has seriously detracted from the significance of the Tokyo trial. Consider, for example, America’s war in Vietnam, the Soviet Union’s suppression of the Hungarian revolt, the Soviet invasion of Afghanistan, and the British-French expedition in the Suez Canal incident. From the standpoint of the legal principles of Tokyo and Nuremberg, it is quite obvious that the leaders of these countries should have been called to account for the illegal use of armed force. As you all know, this had never happened” (p. 46). Two points need to be made with regard to this statement. First, he did not consider it necessary to cite, as did his Soviet co-panelist, the activities of Israel or South Africa. Second, the fact that the leaders of the countries he names have not been tried — assuming that his accusation of guilt is substantial — in no way detracts from the correctness of the deliberations and verdict at Tokyo.

Interestingly, Professor Onuma makes a point that many Japanese would consider equivalent to sacrilege, while western commentators have tended to skirt the same issue. "The political character of the trial is manifest in the treatment of the emperor, who under the Meiji Constitution bore ultimate responsibility for the war. The tribunal not only failed to call the emperor to account for Japan's war of aggression, but did not even summon him as a witness" (pp. 45-6). To some extent, this failure reflected western appreciation of the special status of the emperor in the Japanese ethos. Since Hirohito was struck by his last illness it became clear that, regardless of anything to be found in the MacArthur-imposed, Japanese-acquiesced-to Constitution, large segments of the Japanese population would continue to regard the Emperor as a descendant of Amanoterasu and at least quasi-divine. It remains to be seen how the new dynasty will shape. According to *The Economist* (October 1, 1988, p. 34) there are strong indications that "Japan's national psyche will be liberated from the bitter memory of 1945". If that is so perhaps the dream of Prince Ito will bear fruit and we will see the re-establishment of the Meiji Constitution — and with it a clear rejection of the Tokyo judgment with its condemnation of Japan as an aggressor. It would be interesting to read the papers presented to a similar seminar at such a time.

L.C. Green
University of Alberta

Behind Closed Doors: How the Rich Won Control of Canada's Tax System . . . And Ended up Richer, by Linda McQuaig (Toronto: Viking, 1987). pp. 353.

Linda McQuaig is not an expert. Therein lies an important strength of her book on the Canadian tax system, *Behind Closed Doors: How The Rich Won Control of Canada's Tax System . . . And Ended Up Richer*. Because she is not an expert she has not relied on an insider's knowledge of technical points and jargon and neither has she gotten caught up in a particular discipline's specialist concerns. Rather, as a good journalist, she has provided a lucid critique of the tax system which will be of interest to anyone concerned with how the tax system is or how it came to be.

The thesis of McQuaig's book is, as the title suggests, that the rich have unduly influenced the formation of tax policy in Canada with the result that the tax system greatly favours them. In support of her contention McQuaig constructs a careful case. Her approach is basically historical. After an introductory chapter, the rest of the book describes the evolution of the Canadian tax system from the early 1960s to the present. Though this sounds like dry stuff, it is not. The discussion of the intricacies of tax preferences, incentives, or loopholes, (the terminology depends on one's ideology), as well as new ways of viewing the tax system such as the tax expenditure concept, is informed and enlivened by her portraits of the important players of the times.

McQuaig's hero is Kenneth Carter, Chairman of the Royal Commission on Taxation. The Commission was established by John Diefenbaker in the early '60s to curry favour with certain business interests who had identified aspects of the tax system which impeded their operations. In the view of many of his peers, Carter, a member of the business and social establishments of Montreal and Toronto, turned traitor to his class by producing a Report calling for the elimination of numerous tax preferences in the Canadian tax system and for the full taxation of capital gains. To quote one of his more moderate business colleagues of the time, Montreal accountant Herbert Spindler: "It (the Report) is probably fair, rational and even inevitable. And yet — somehow it is rape."

As McQuaig makes clear in her book, tax reform, at least of the kind envisioned by Carter, was by no means inevitable. After an initial period of quiescence, the government was inundated with briefs and personal representations from angered business leaders who threatened to take their investments elsewhere. The most vehement attacks came from the American multinationals in the mining and resource sectors. Carter had

recommended an immediate end to depletion allowances, noting that roughly 85 per cent of depletion allowances in 1964 were enjoyed by only five mining companies and three oil companies. The American oil companies were particularly anxious that no Canadian precedent be established for action south of the border.

If the press was initially somewhat sympathetic, any support for the reforms was eroded by the continuing play of stories of business executives recounting the dangers of the reform proposals in public speeches and before various parliamentary committees. All this left the public with the impression that there must be a great deal wrong with the proposals. The media failed to present an alternative view. Perhaps, as McQuaig suggests, the media reflected the beliefs of its wealthy owners. Another reason might have been that it simply did not have the expertise to engage in an often highly technical debate. Furthermore, the proponents of the Carter position lacked a presence. Carter himself was dying from cancer, and the people who supported the Report were outmanned and outgunned.

The years following tax reform in 1972 witnessed further erosion of the already greatly watered-down versions of Carter's proposals which had been enacted into legislation. The archvillain of the time, according to McQuaig, was Marshall Cohen. He served in various capacities in the Department of Finance, most notably in the influential post of Assistant Deputy Minister for Tax Policy (1971-77) and finally as Deputy Minister (1982-85). Urbane, connected, and a former tax practitioner, Cohen, during his tenure at Finance, espoused the "breathing room" philosophy of tax policy. Part and parcel of this philosophy was the idea that if a tax system becomes too "tight", the major players might just refuse to play the "game." Clearly, McQuaig does not find this approach credible. She rightly questions whether in fact investment and other business decisions are as tax-driven as is sometimes argued. Her distaste for the philosophy, however, prevents her fully exploring the arguments in its favour. Furthermore, the portrait she draws of Cohen is a caricature that fails to adequately illuminate the man and the *milieu* in which he wielded considerable influence.

The only positive developments seen by McQuaig in the era since tax reform were the proposals in Allan J. MacEachen's budget of November 1981. The budget, which was generally an exercise in base broadening and loophole closing, infuriated the business community. Their attack was intensified and partly justified by the fact that many of the budget provisions were retroactive. As a result the tax rules would in certain circumstances have changed half way before the completion of some

business transactions. In any case, Finance beat a hasty retreat and MacEachen lost his chance to be Prime Minister.

After MacEachen, the forces of reform were in disarray. Consultation was in vogue, and it was largely with the advice and assistance of tax experts from the private sector that the disastrous scientific research credit programme was implemented. As unbelievable as it may seem, the programme operated without any means of vetting the legitimacy of the research programmes for which the government awarded generous tax credits. The normal safeguard in a free enterprise system of investor confidence was eliminated because the researcher who typically had no significant tax liability was permitted to "sell" his unused tax credits. The buyer, unlike a normal investor, was interested primarily in the tax break and not the ultimate return on his "investment." Hence, the buyer had no reason to stay around to see that the research was actually carried on in a competent and timely manner. Thus the Canadian public sponsored research to investigate the differences between black-and-white and red-and-white cows, and contributed over five million dollars in tax credits to computer "research" directed by a drop-out from an introductory computer course at the University of Victoria. A lot of the research simply did not get done. The drain on the Treasury was enormous. In the less than ten months that the programme was officially in place, it cost \$2.8 billion. About a third of that amount, around \$925 million, was wasted and the rest went to projects ranging from the deserving to the dubious. To put the numbers in perspective, McQuaig estimates that the total federal spending on university research in all fields for that year was about \$540 million.

The last chapter of McQuaig's book is on Michael Wilson's recent "tax reform." McQuaig's view is summed up in the title of the chapter: Michael Wilson and the Hijacking of Tax Reform. McQuaig has two main criticisms. First, she objects to the half nature of Wilson's reforms which do, to some extent, reduce tax preferences and eliminate some unfairness in the system. She contends that his reforms impact most adversely on the middle class. Thus she cites, for example, the change from personal tax exemptions to credits. Under the old system the exemptions were worth more to higher income taxpayers (the amount of the exemption multiplied by the marginal rate of tax) than to lower income taxpayers. Credits will be worth the same to all taxpayers (as long as they have a tax liability equal to the credit or the credits are refundable). However, the main losers, proportionally, will be the middle class. This theme of the shift of tax onto the backs of the middle class also underlies her second main criticism. Wilson's reforms involve the introduction of a national sales tax to replace the obsolete and inefficient

federal sales tax. The inevitable result will be that a greater proportion of federal government revenues will be collected by a "regressive" sales tax than through the "progressive" income tax system. Wilson will "protect" lower income taxpayers with a sales tax credit. Presumably the middle class will be fair game since they have the choice to consume or save.

Since McQuaig's book has been written, a national election has been fought and won by the Mulroney government. Whether or not it can be said that Wilson's proposed reforms have been vindicated by the electorate, it is clear that the future trend will be away from the operative principles in the Carter Report of fairness and equity. To oversimplify, the question has become "Why are the bad guys winning?" It is a question for which McQuaig does not have a complete or satisfying answer.

McQuaig's viewpoint is, not surprisingly for a mainstream journalist, quintessentially liberal. (She has been called, I am sure to her considerable amusement, a left-wing radical and a Marxist.) Her belief, which infuses the whole book, is that if only people are informed, if only they knew what had gone on, there would be true tax reform. Alas, there is considerable evidence that the Canadian people know and have always known that the system is unfair but continue to tolerate it.

McQuaig does cite some of the factors which seem to militate against tax reform in this country. These include the role of the provinces, which is generally not progressive, special interests and their special access to the government, and the passivity and conservatism of the media. There is also the problem that reform imposes a heavy burden on a politically aware economic elite while promising relatively small benefits to the masses. Although she makes short shrift of the economic arguments concerning the "double taxation of savings" they deserve more time. She ascribes relatively little importance to arguments that the Canadian and American tax systems should be congruent. Given recent developments in the free trade area, this is a curious omission. She ridicules what she describes as the mythology of "business confidence." And yet in a world in which capital is generally more mobile than labour, business confidence, like it or not, is a factor with which governments must be concerned. Finally, she does not recognize the ubiquitousness of the myth of upward mobility in our country and its effect upon pressure for social and economic change. Some interesting American studies have shown that changes in the tax system which would benefit the "losers" have not been favoured by them because of their hope that sometime in the future they might be able themselves to take advantage of the loopholes.

In the final analysis, even if McQuaig cannot give a definitive answer to the vexed question of "Why not true tax reform?" (and who can), she does provide a valuable critique in the best muckraking tradition. Even if to know is not enough impetus for change, it is a necessary first step.

Faye Woodman
Dalhousie Law School

DALHOUSIE LAW JOURNAL



Volume 12 Number 2 November 1989

The Dalhousie Law Journal

Editorial Committee

Faculty

John A. Yogis, Q.C.

Chairman and Editor

Alastair Bissett-Johnson

Associate Editor and Articles Editor

Hugh Kindred

Comments Editor

Jennifer Bankier

Book Review Editor

R. St. J. Macdonald, O.C., Q.C.

C. L. Wiktor

Students

R. Steven Baldwin

Editorial Assistant

Susan MacKay

Jim Hornley

The Dalhousie Law Journal is published by the Faculty of Law of Dalhousie University. Communications having to do with editorial matters should be addressed to The Editor, Dalhousie Law Journal, Faculty of Law, Dalhousie University, Halifax, Canada, B3H 3J5. The Editorial Committee welcomes the submission of material for possible publication and advises potential contributors that a style sheet is available from the Editor. Views expressed in a signed contribution are those of the writer, and neither Dalhousie University nor the Faculty of Law accepts responsibility for them.

The Journal gratefully acknowledges the assistance of the Social Sciences and Humanities Research Council of Canada.

The Dalhousie Law Journal is financed in part from a fund established by McInnes, Cooper & Robertson, Barristers & Solicitors of Halifax, to honour Donald McInnes after 60 years of service as a legal practitioner in Nova Scotia. Among honours and activities too numerous to list here, Mr. McInnes was president of the Canadian Bar Association in 1960-61 and for 22 years was Chairman of the Board of Governors of Dalhousie.

The articles by Sarah K. Harding and Leanne Todd were written and published with the financial support of the J.S.D. Tory Foundation. The Journal is thankful to the Foundation for their support.

This issue of the Journal was printed by McCurdy Printing & Typesetting Limited. All communications concerning subscriptions should be addressed to The Carswell Company Limited, 2330 Midland Avenue, Agincourt, Ontario, M1S 1P7. The price of an individual copy is \$12.50. "Indexed": Index to Canadian Legal Periodical Literature.

